Filed 9/21/06 P. v. Langston CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH W. LANGSTON,

Defendant and Appellant.

F047449

(Super. Ct. Nos. 96363 & 110355)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. James W. Hollman, Patrick J. O'Hara, Paul A. Vortmann, and Darryl B. Ferguson, Judges.

Peter Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, David A. Rhodes and Clayton S. Tanaka, Deputy Attorneys General, for Plaintiff and Respondent.

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PROCEDURAL HISTORY

Appellant Joseph Langston was charged in 2002 with corporal injury to a cohabitant (Pen. Code,[1] § 273.5, subd. (a)); assault by means likely to inflict great bodily injury (§ 245, subd. (a)(1)); dissuading a witness (§ 136.1, subd. (b)(1)); resisting an executive officer (§ 69); being under the influence of methamphetamine (Health & Saf. Code, § 11550, subd. (a)); and resisting arrest (§ 148, subd. (a)(1)) (case No. 96363). The information also charged as to the first four counts that appellant has suffered a prior strike within the meaning of California's "Three Strikes" law (§ 1170.12, subd. (c)(1)), and that appellant has served a prior prison term (§ 667.5, subd. (b)). A jury acquitted appellant of corporal injury to a cohabitant and dissuading a witness and convicted appellant on assault with a deadly weapon, resisting an executive officer, being under the influence of methamphetamine, and resisting arrest. In a bifurcated proceeding the jury found that appellant had suffered the prior strike and that he had served a prior prison term.

In 2005, appellant entered a plea of no contest to possession of ammunition by a felon (§ 12316, subd. (b)) and admitted to having a prior strike conviction (§ 1170.12, subd. (c)(1)) and to being out on bail at the time of the offense (§ 12022.1) (case No. 110355). Appellant also entered a no-contest plea to being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)).

Appellant was sentenced on February 4, 2005, on both cases to a total term of nine years, eight months in state prison. The court imposed the mid-term doubled of six years on the assault charge, plus one year for the prior prison term, a consecutive one-third the mid-term doubled of one year, four months, on the resisting charge and a consecutive one-third the mid-term doubled of one year and four months on the possession-of-

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[1] All further references are to the Penal Code unless otherwise noted.

ammunition charge. The court then struck the one-year prior-prison-term enhancement. No time was imposed on the remaining two counts.

FACTUAL HISTORY

Appellant and E. A.'s relationship was turbulent to say the least. On August 14, 2002, the two were at the Rally's hamburger restaurant in Porterville. E. A.'s toddler was with them. Appellant and E. A. began to argue. Appellant began to choke E. A. and to slam her head into the side of their truck and to slam the truck door on E. A.'s upper torso. The attack was observed by the Copeland family who were waiting for food at a nearby Taco Bell. E. A. was screaming for help. At one point she broke free, picked up her child and ran to the Rally's drive-up window. Appellant caught up to her and continued to choke her. She handed the child through the drive-up window to a Rally's employee. Then E. A. either jumped or was pushed through the window herself. Appellant sped off in the truck.

When police arrived, E. A. and the witnesses gave statements to the officers. Officer Cornwall observed that E. A. was covered with bruises and abrasions on her face, mouth, arms, and neck. She appeared frightened and was crying. E. A. told the officer that her injuries were received the night before when appellant and E. A. were fighting. The next day, police officers went to arrest appellant at the trailer where the two lived. Appellant resisted arrest and a struggle ensued. The facts underlying the remaining counts are not relevant to the issues raised on appeal.

DISCUSSION

I. Competency inquiry

Appellant contends that his conduct at the three hearings held on August 27, 2002, October 28, 2002, and June 18, 2003, should have raised questions about his competency to stand trial and invoked the trial court's duty to conduct a competency hearing pursuant to Penal Code sections 1367 and 1368. The latter two were held pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. We disagree.

"Trial of an incompetent defendant violates the due process clause of the Fourteenth Amendment to the United States Constitution [citation] and article I, section 15 of the California Constitution." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1281.) In California, these protections are implemented by statute. (§ 1367, subd. (a); § 1368.) A defendant is mentally incompetent if, as a result of a mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense. (*People v. Jablonski* (2006) 37 Cal.4th 774, 805-806.) If a doubt arises in the mind of the court about the mental competence of the defendant, the court must inquire of defense counsel as to the mental status of the defendant. If counsel believes that the defendant may be incompetent, the court shall order a hearing to determine the defendant's competency. (§ 1368, subds. (a) & (b); see also *People v. Welch* (1999) 20 Cal.4th 701, 738 [if a defendant comes forward with substantial evidence of incompetence, full competence hearing required, even if court has not earlier expressed doubt of competency].) A defendant is presumed competent unless the contrary is proven by a preponderance of the evidence. (§ 1369, subd. (f); *People v. Medina* (1990) 51 Cal.3d 870, 881-886.)

After a careful review of the transcripts of the three hearings, we find nothing that would raise a question about appellant's competency. In the August 27, 2002, hearing, appellant told the court he wanted to fire his attorney, the public defender. He claimed the attorney was "just a 'go-along'" and "might as well be a DA." He told the court there was a personality conflict. The court agreed to set the matter over to see if a new deputy public defender could be appointed. This was apparently done. At the October 28, 2002, *Marsden* hearing, occurring shortly before the preliminary hearing, appellant complained that the public defender said everything was "irrelevant." Appellant said he wanted E. A. interviewed because he believed she was lying and could be impeached. He asked the court, "[h]ow can it not be a relevant fact if she was lying …?" His complaints were clearly articulated and stemmed from an obvious misunderstanding of the nature and

purpose of a preliminary hearing. Appellant also complained that the public defender's office had previously represented E. A., a legitimate concern.

At the June 18, 2003, hearing, appellant complained that he believed defense counsel was "sleeping with the enemy." He said it made him "nervous" that his attorney was eating lunch and talking with the prosecutor. He said his mother had seen the two of them laugh and talk about the case in court, along with the judge, when he was not present. Appellant said he had not "[given] … permission" to his attorney to talk to the prosecutor. Defense counsel acknowledged that, although no one had been laughing at appellant or about the case, he and the prosecutor were both "lighthearted" and "there may have been some laughter on something …." Appellant also complained that his attorney would not file motions against the police officer for lying, which he claimed could be proven, or file charges against the officer for perjury. These complaints were again clearly articulated and unquestionably arose from a misunderstanding of the nature of the proceedings, the need for opposing lawyers to remain civil and cooperative in trial, and the way credibility determinations are made at trial.

The complaints made by appellant do not in any way suggest that appellant was unable to understand the nature of the criminal proceedings or assist his attorney with the defense. Appellant is not a lawyer, and it is not uncommon for criminal defendants, due to a lack of legal training, to question various decisions made or actions taken by their defense counsel. His comments were not bizarre, disconnected, or irrational. In our experience, it is not uncommon for criminal defendants to be suspicious of their counsel's loyalty and commitment as a result of strategic decisions made during trial preparation. This does not, however, equate with incompetency. In fact, the questions asked and the comments made by appellant reveal a fairly sophisticated understanding of his case.

Appellant points out that in September 2003, after the trial in case No. 96363 had concluded, and during proceedings in case No. 110355, defense counsel expressed a

doubt over appellant's competency. As a result, the trial court ultimately suspended proceedings. Criminal proceedings were reinstated on December 10, 2004, after appellant was reported to be malingering. Appellant was committed to Atascadero State Hospital pursuant to section 1368.

Appellant claims the "crucial question" is whether he was competent at the time of his first trial (July 2003) given that he was found incompetent in September 2003 in his second case. Even if we were to disregard the later determination that appellant was malingering, appellant has offered no argument or authority for his conclusion that what was true in September of 2003, must also have been true in July 2003. The cases cited by appellant do no more than state the law: If the trial court has any reason to question the defendant's competency, a careful inquiry should be made. There is nothing in this record, however, to establish that the trial court had any information before it raising a question about appellant's ability to understand the nature of the proceedings or to assist counsel in conducting a defense. If anything, the record portions relied upon by appellant support a contrary conclusion—that appellant was competent and did understand. Indeed, the trial court stated as much on April 20, 2004, during a hearing on the motion for new trial in case No. 96363. The court noted that the issue of appellant's competency had not been raised in case No. 96363 and that during the many conversations with appellant during the various *Marsden* hearings, appellant was "lucid" and "responsive to the questions asked." "It appeared to [the] court that he had no difficulty understanding the nature of the proceedings, [it] didn't appear to [the] Court that he had any difficulty or would have any difficulty assisting his attorney during the course of the trial. There was no indication to [the] Court that he was incompetent, and there was no indication, apparently, to his attorney that he was incompetent during the trial."

In the absence of any indication of incompetency, and in the absence of any proof establishing that appellant was incompetent, there was no duty to conduct a competency hearing.

II. Alleged conflict of interest

Appellant contends that the trial court failed to conduct a proper inquiry into allegations that the public defender's office had a conflict of interest preventing adequate representation. The record confirms that the public defender's office had previously represented E. A. on a misdemeanor DUI case in 2001 and that at the time of trial, E. A. was still on probation. Defense counsel advised the court of this and that there was no relationship between the two cases which would give rise to a conflict. The court said that "[i]f the Public Defender's Office doesn't feel they have a conflict, the Court doesn't see a conflict."

The issue was again raised on October 28, 2002. At the *Marsden* hearing on that date, defense counsel informed the court that the prior representation of E. A. was on a DUI offense and a Health and Safety Code section 11550 offense. Appellant said, "[f]alse information to a police officer too." This was not, however, confirmed by counsel. Defense counsel explained, "these are issue of public record and our office told him it was not a conflict because what we are going to do is impeach [E. A.] with public records so there is not a separate attorney/client privilege."

Finally, at the August 21, 2003, *Marsden* hearing in the second case, after trial was completed in the first case, appellant represented that E. A., when stopped on the DUI offense, told the police she had been beaten up by her boyfriend. He claimed the public defender representing him was E. A.'s attorney. The public defender did not remember representing E. A. and stated she knew she did not take the matter to trial and did not believe there would be any conflict. The court put the matter over in order to determine the nature of the representation. As far as we can determine from the record, the matter was never heard. Proceedings were suspended on September 10, 2003, and the issue was not revisited after appellant's return to competency and restoration of criminal proceedings in December 2004.

We have no problem with appellant's assertion that a criminal defendant is entitled to the undivided loyalty of his attorney. (*People v. McDermott* (2002) 28 Cal.4th 946, 990 [federal and state constitutional rights to the assistance of trial counsel include the right to representation by counsel without any conflict of interest]; *People v. Jones* (1991) 53 Cal.3d 1115, 1134 [Sixth Amendment right to counsel includes the right to representation that is free from conflicts of interest].) "Conflicts of interest may arise in various factual settings. Broadly, they 'embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests.'" (*Id.* at p. 1134.) Conflicts may arise in situations in which an attorney represents a defendant in a criminal matter and currently has or formerly had an attorney-client relationship with a person who is a witness in that matter. (*People v. Bonin* (1989) 47 Cal.3d 808, 835; see also *In re Darr* (1983) 143 Cal.App.3d 500, 509 [conflict exists where counsel concurrently represents a criminal defendant and a witness whose interests are adverse].) And we agree that when a court knows or reasonably should know that a conflict exists, it has a duty to inquire into the nature of the conflict, even in the absence of an objection by the defendant. (*Mickens v. Taylor* (2002) 535 U.S. 162, 166-168; *People v. Cornwell* (2005) 37 Cal.4th 50, 75-76.)

Applying these rules to the facts of this case, however, we disagree that reversal is required. First, we are not persuaded that the trial court's inquiry was inadequate, as appellant contends. In case No. 96363, both times the issue arose, the trial court inquired into the nature of the prior representation and solicited input from the public defender. Both times, the court was told the prior representation of E. A. was on a misdemeanor offense[2] and that the public defender's office felt there was no conflict given the lack of

[2]At trial, the prosecutor represented that E. A.'s prior record included a 1991 DUI felony; a 1997 possession conviction (Health & Saf. Code, § 11377); a 1997 misdemeanor vandalism conviction (§ 594, subd. (a)); and, in 2001, a second DUI and a driving-with-a-revoked-or-suspended-license conviction (Veh. Code, § 14601).

connection between E. A.'s prior offenses and appellant's current offenses. The trial court was free to accept defense counsel's representation. (See *People v. Hardy* (1992) 2 Cal.4th 86, 137 [a criminal defense attorney is in best position to determine when conflict of interest exists or will develop, citing *Holloway v. Arkansas* (1978) 435 U.S. 475, 485].) The trial court is also free to limit its inquiry if, in its view, the potential for conflict is too slight. (*People v. Cornwell, supra,* 37 Cal.4th at p. 75.)

With respect to the August 21, 2003, hearing, where the issue was raised a final time, we also find no error. The court agreed on August 21 to conduct a more detailed inquiry into appellant's assertion that a conflict existed. But the matter was delayed due to appellant's competency issues. The concern over a potential conflict of interest was never raised again. By renewing the issue, appellant abandoned his claim. (See *People v. Kenner* (1990) 223 Cal.App.3d 56, 59 [abandonment found where court ordered hearing on assertion of right to self-representation continued, but defendant never raised issue again or sought to have hearing calendared].)

In any event, even if we were to conclude that the court should have conducted further inquiry, we would not reverse. We disagree that this type of error is reversible per se. Our state Supreme Court has clearly stated that a trial court's failure to satisfy its duty to inquire into a possible conflict, or to adequately respond to its inquiry, requires reversal only where the defendant demonstrates that an actual conflict of interest existed and that the conflict adversely affected counsel's performance. (*People v. Frye* (1998) 18 Cal.4th 894, 999; *People v. Cornwell, supra,* 37 Cal.4th at p. 76.) As the court explained, the conflict-of-interest doctrine is a component of the Sixth Amendment right to effective assistance of counsel. (*People v. Cornwell, supra,* at pp. 77-78, citing *Mickens v. Taylor, supra,* 535 U.S. at p. 166.) Infringement of the right to counsel does not require reversal of a conviction in the absence of a showing that it is reasonably probable the attorney's ineffective representation affected the outcome. Appellant was not denied the assistance of counsel entirely or at any critical stage of the proceedings.

A trial court's duty to inquire into a potential conflict of interest does not require per se reversal. (*Mickens v. Taylor, supra,* 535 U.S. at p. 166.) When a defendant claims that a trial court's inquiry into a potential conflict was inadequate, the defendant still must demonstrate the impact of the conflict on counsel's performance. (*People v. Cornwell, supra*, 37 Cal.4th at pp. 77-78.) Similarly, a defendant claiming that his or her attorney actively represented conflicting interests must demonstrate that the conflict of interest actually affected counsel's representation. (*Ibid*.) As an intermediate appellate court, we are bound to follow the decisions of the California Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Appellant has failed to meet this burden. There is no evidence that defense counsel actually possessed confidential information arising from the prior representation that prevented absolute loyalty to appellant. (See *Leversen v. Superior Court* (1983) 34 Cal.3d 530, 538 [dual representation of a defendant and prosecution witness poses risk that counsel would possess confidential information concerning prosecution witness beneficial to defense, which counsel could not ethically use; attorney is forbidden from using confidential information acquired during representation against former client].) Defense counsel did attack the victim's reputation for truthfulness by calling witnesses, appellant's mother, and his friend. Appellant claims this was a "feeble strategy" because of the bias likely attributed to each of these two witnesses. Yet, appellant fails to acknowledge that the defense also called defense investigator Jake Torrence, who previously was employed as an investigator for the Tulare County Sheriff's Department for 11 years. Torrence also testified that E. A. told him appellant had not hit her at Rally's.

Appellant also argues that defense counsel made "no attempt to use [E. A.'s] prior conviction of driving while intoxicated in order to show that she had falsely claimed that her boyfriend had beaten her up, thus excusing her conduct." Yet, there is no evidence in this record that this is fact. Appellant merely asserts this is true during the *Marsden*

motion, but offered no evidence to support his assertion. In any event, we do not see how this could have assisted his cause. This case did not turn on E. A.'s credibility. There were numerous unbiased witnesses to the attack. The jury only convicted on count 2, where E. A.'s initial report was substantiated by independent, unbiased witnesses. The jury acquitted appellant on count 1 (the corporal injury count alleged to have occurred the night before the Rally's assault) where the offense depended entirely on E. A.'s various statements to others. In any event, appellant has not shown that an actual conflict existed or that any conflict affected counsel's representation. We will not engage in speculation for the purpose of reversing the jury's verdict.

III. Crawford error

Appellant's third contention of error is that he was denied his constitutional right to confront witnesses when the trial court admitted E. A.'s statements to police officers after it determined that E. A. was not available to testify, citing *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). In *Crawford*, the prosecution introduced at trial a tape recording of a police interview with a witness who did not testify. The United States Supreme Court reversed the conviction, announced a new rule, and found that the interview was not admissible. The court held that the confrontation clause bars admission of out-of-court testimonial statements made by a witness to law enforcement officials unless the defendant has had a prior opportunity to cross-examine the witness and the witness is unavailable to testify at trial. (*Id.* at p. 68.) Although *Crawford* did not define the term "testimonial," we are confident that statements given to police during an official investigation fall within Crawford's definition of testimonial. (*Ibid.*; *People v. Corella* (2004) 122 Cal.App.4th 461, 468.)

Assuming that *Crawford* applies, we apply the two-pronged exception to the rule to see if it permits admission of E. A.'s statements in this case. The trial court found that the victim was unavailable at trial. Appellant takes issue with the trial court's finding, but we need not decide whether E. A. was or was not available because it is undisputed

that appellant never had an opportunity to cross-examine E. A. A prior opportunity to cross-examine a witness is dispositive on the question of whether testimonial statements are admissible. (*People v. Wilson* (2005) 36 Cal.4th 309, 339-348.) Thus, admission of E. A.'s statements violated the confrontation clause as interpreted by *Crawford*.

Error under *Crawford* is tested by the standard of *Chapman v. California* (1967) 386 U.S. 18, 24 to determine if the error is harmless beyond a reasonable doubt. (*People v. Pirwani* (2004) 119 Cal.App.4th 770, 791.) An error is harmless when it does not contribute to the verdict because it is "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt* (1991) 500 U.S. 391, 403, disapproved on other grounds in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4; see also *People v. Neal* (2003) 31 Cal.4th 63, 86.) There were two counts charged involving E. A., counts 1 and 2. Officer Cornwall testified, over defense objection, about E. A.'s statements concerning both the attack at Rally's and the attack allegedly occurring the night before at the couple's trailer. Also before the jury was the testimony of appellant's mother, a friend, and the defense investigator concerning statements made by E. A. that contradicted E. A.'s statements to Cornwall. The jury convicted appellant only on count 2, the Rally's attack.

The evidence concerning the Rally's attack was nearly irrefutable. The attack was witnessed by no less than four unbiased witnesses. The three members of the Copeland family, who viewed the entire attack, and Valerie Figueroa, a Rally's employee, all testified at trial to its vicious nature and identified appellant as the attacker. A second Rally's employee was going to be called as a witness, but the trial court refused to allow the witness to testify, ruling that the testimony would be cumulative. Appellant's presence at Rally's was never challenged. All four witnesses testified to the level of violence used. These witnesses were consistent in their testimony and had no reason to lie. Officer Cornwall responded to the restaurant and interviewed all the witnesses. The witnesses' prior statements were consistent with their trial testimony. In addition,

Cornwall testified that E. A. was frightened and crying when he spoke with her. Given the strength of this evidence, the admission at trial of E. A.'s statements to police in violation of *Crawford* was harmless beyond a reasonable doubt.

Because we have found the erroneous admission of E. A.'s statements harmless beyond a reasonable doubt, appellant's final contention that the trial court erred in finding that E. A. was unavailable under Evidence Code section 1370 is moot. Error in admitting evidence in violation of the Evidence Code is reviewed under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, a lesser standard of review. If admission of the evidence is harmless under a *Chapman* analysis, it is also harmless under a *Watson* standard.

DISPOSITION

The judgment is affirmed.

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Wiseman, J.

WE CONCUR:

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Harris, Acting P.J.

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Cornell, J.